Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HENRY C. HIGGINS, PETITIONER

v.

DEPARTMENT OF AIR FORCE,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner's 5th Amendment Right to Notice was violated by Respondent?

II. Whether the evidence established the charges levied against Petitioner ?

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OPINIONS BELOW

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit's Judgment, without an Opinion, is attached as Appendix A-1.

JURISDICTION

On March 19, 2003, the Respondent proposed Petitioner's Removal from his position of Assistant Fire Chief at the Dover Air Force Base, Fire and Emergency Services (Dover AFB). (A[1] 41) At this time Petitioner was a tenured public employee. On December 15, 2003 and December 16, 2003, a hearing before the Merit Systems Protection Board (MSPB) was held. Prior to the hearing, Petitioner requested a continuance because he was without an attorney since June of 2003 and was unable to retain another attorney until December 10, 2003. The Judge denied the request. Petitioner's Counsel was not, and could not have been, prepared for the Hearing, considering the issues and the volume of documents involved. Hearing Counsel, Petitioner states, also *fell asleep* 4 to 5 times per day of hearing[2]. On January 29, 2004, the Initial

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[1] A refers to the Appendix submitted in the Court of Appeals for the Federal Circuit.

[2] During the hearing, Hearing Counsel, failed to establish most, if not all, of the points alleged in this Petition. These points come from the "Agency File," a file of relevant documents prepared and submitted into the record by Respondent prior to the Administrative hearing. The "Agency File" is prepared in response to the MSPB's Acknowledgment Order pursuant to *5 C.F.R. § 1201.25.* As such, both Hearing Counsel and the Administrative

Decision upheld the removal. (A 15) On May 13, 2005, the MSPB affirmed the Initial Decision. (A 1) On September 7, 2006, the Federal Circuit affirmed the Order of the Merit Systems Protection Board. At a time when jobs are so difficult to find, it is very unfair for a 53 year old person to be terminated in such a manner.

The jurisdiction of this Court is invoked under U.S. Constitution, Art. III, Section 2[3] and 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

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Judge had a duty to review these documents that were part of the record. This very record contradicts Respondent's allegations and charges.

[3] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States... to controversies to which the United States shall be a party . . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. *U.S. Const. Art. III, Section 2.*

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner, a disabled veteran, is a 53 year old African American male. (A 46, 47) Petitioner was terminated under a subterfuge exaggerating and even misrepresenting facts. As if that was not enough, Petitioner was the victim of trial by ambush when Respondent did not include in the Notice of Proposed Removal, as constitutionally required, several facts upon which the removal was predicated.

Before becoming Assistant Fire Chief, Petitioner had worked for 21 years in the U.S. Air Force as: 1) fire fighter, 2) driver/operator, 3) crew chief, 4) fire prevention inspector, 5) chief fire inspector, 6) assistant fire chief, 7) assistant chief for training, 8) deputy fire chief, and 9) fire chief. (A 47-48) In 1996, Petitioner earned a B.S. in Fire Science Management at Southern Illinois University. (A 47-48, 538) On July 12, 1999, Petitioner was hired by Dover AFP, as an Assistant Fire Chief, GS-10. (A 541) For the following two years everything appeared to be fine.

However, on July 13, 2001, Petitioner, commenced Informal EEO Counseling. On August 21, 2001, Petitioner filed a Formal Complaint. This Complaint was subsequently amended several times. The Complaint named Mr. Donald Striejeske, Fire Chief, and Mr. Lawrence McDonald, Senior Master Sergeant, as the discriminating officials. (A 50) On

October 1, 2001, Petitioner was given a Letter of Reprimand (A 58) for an event that took place five months prior. The merits of the Letter of Reprimand come into question since it was given five months after the fact.[4] Perhaps this was the first step in Respondents decision to remove Petitioner.

The Notice of Proposed Removal (Notice) charged Petitioner with "wanton[5]" disregard of operational directions and failure to follow procedures." (A 41)

> A. On January 21, 2003, at 18:42 hours . . . , Petitioner, . . . did not assume command. Petitioner did not set up supply or attack lines. Petitioner directed one of his vehicles to reposition to a fire hydrant when in fact the vehicle had correctly positioned itself at the building entrance. Petitioner directed his crew to stay in their vehicles until the City of Dover Chief arrived. At 18:49 hours, Petitioner directed his crew to go inside and inspect the building. Petitioner did not utilize the 800 Mhz radio. . . Petitioner directed his subordinates not to set up lighting unless directed to do so.

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[4]This discipline can be disregarded by the Court, because the Deciding Official who approved the Notice of Proposed removal, testified that he did not consider Petitioner's prior disciplinary record.

[5] Wanton is defined as reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness or reckless disregard of the rights or safety of others. Black's Law, 4th Ed.

B. On January 22, 2003 at 3:11 hours, Petitioner did not use the 800 Mhz radio. Petitioner did not allow his crew to investigate, and directed his crew to await for law enforcement, after the General's Green Complex Manager told one of his crew that the alarm was set off by vandalism. Petitioner, upon arrival of the local fire company did not turn over command to them.

The Notice also alleged leave violations which the Court can disregard and this Petition will not address, because the Official testified that the leave violations would not require removal. (A 460-462)

The essence of the allegations against Petitioner are based on the responses to two alarms during the night shift of January 2, 2003, *where there was no fire, no visible smoke, no damage to property, and no injury.*

As such, Petitioner submits that the June 6, 2003 termination was really a result of his prior EEO activity and that Respondent intentionally mischaracterized and exaggerated the events of the night of January 21, 2003, in order to, plainly speaking, get rid of Petitioner.

REASONS FOR GRANTING THE PETITION

I. RESPONDENT DID NOT DISCLOSE A NUMBER OF REASONS USED TO REMOVE PETITIONER IN VIOLATION OF THE "NOTICE" REQUIREMENT OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution guarantees a federal employee a right to notice and an opportunity to be heard before being terminated.[6] Specifically, in *Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct.1487 (1985)* the Supreme Court stated:

> . . . the Due Process Clause provides that ceratin substantive rights - life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures." The Court further stated " a property interest in public employment . . . may not . . . [be deprived] without the appropriate procedural safeguards. . . . An essential principle of due process is that a depravation of life, liberty, or property be precede by notice and an opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanaover Bank & Trust Co., 339 U.S. 306, 313 (1950).* We have described the root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interest in his employment. *Boddie v. Connecticut, 401 U.S. 371, 379 (1971).*

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[6]"... nor be deprived of life, liberty, or property without due process of law...." *U.S. Const., Amend. V.*

Loudermill, at 540-542. The Court further stated in a cryptic and very telling summary, that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Id. at 546, citing Arnett v. Kennedy, 416 U.S. 134, 170-171 (1974).*

The Federal Circuit recognized this principle and in *Stone v. FDIC, 179 F.3d 1368 (Fed Cir. 1999). Stone* dealt with an employee of the Federal Deposit Insurance Corporation who was terminated for forging leave slips. During the proceedings it was discovered that the proposing official had sent the deciding official a memorandum recommending his dismissal. *Id. at 1372 - 1373.* This memorandum nor its contents were included in the Notice of Proposed Removal. The Federal Circuit vacated the Board's decision because it failed to analyze the issue within the requirements of Due Process Clause of the 5th amendment of the U. S. Constitution. *Id. at 1374.* The Federal Circuit found that Stone had a property interest in his job and that he was entitled to due process of law under the 5th Amendment of the U.S. Constitution. *Id. at 1374 - 1375.* The Federal Circuit also found that the introduction of new and material evidence violated Stone's rights to notice and an opportunity to respond. *Id. at 1376.* The Federal Circuit further explained the importance of these rights by stating:

> Procedural due process guarantees are not met if the employee has notice only of ceratin charges or portions of the evidence and the deciding official considers new and material information. It is constitutionally impermissible to allow a

> deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. Our system is premised on the procedural fairness at each stage of the removal proceedings. An employee is entitled to a certain amount of due process rights at each stage and , when these rights are undermined, the employee is entitled to relief regardless of the stage of the proceedings.

Id. at 1376. In *Kriner v. Department of the Navy, 61 M.S.P.R. 526 (1994),* the MSPB stated the notice must be sufficiently detailed to provide a meaningful opportunity to respond and be heard. *Id. citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). See also, Coltrane v. Department of the Army, 25 M.S.P.R. 397 (1984).* Last, this principle has been added to the Code of Federal Regulations governing disciplinary actions. *See 5 U.S.C. § 7513 (b)(1) & (4).* Basically, the test is whether the information is specific enough to permit a response. *James M. Ragolia v. United Sates Postal Service, 983 F.2d 1086 (Fed. Cir. 1992).*

Here, the Proposing Official, proposed Petitioner's Removal for alleged failure to follow procedures during two responses to the Apartments. However, during the Hearing, the Deciding Official testified that other factors were considered for his decision. The Deciding Official testified about: (1) Petitioner's "inability to follow procedures," but did not provide specifics;(A 465); (2) about Petitioner's lack of "adaptability" to work; (A 466); (3) about Petitioner's inability to perform when called upon, again, he did not provide specifics; (A 467); (4) about

Petitioner's terse and angry demeanor when things did not go his way; (A 283); and (5) about an alleged fire, i.e., " . . .*[i]n one case there actually was a fire in the building, it wasn't just an alarm. . . .That to me was very serious. And probably - -that was the thing that weighed the most heavily.*" (A 474) (*emphasis added*) The allegation refers to the first alarm involving a steak being broiled. However, it is incorrect. The radio transcript does not state that there was a fire. (A 81-88) Also, the independent investigations prepared by two of Respondent's "Experts," Mr. Wayne Nello, Fire Chief from Andrew Air Force Base, and the Independent Review of the Personnel Action by Mr. Randy F. Caratachea, Command Fire Chief, Head Quarters Air Combat Command, Langlely Air Force Base, did not state that there was a fire. (A 99,105) However, the above additional factor was, according to the Deciding Official, "very serious."

An application of the law to the facts establishes that Petitioner was a tenured employee and, as such, had a property interest on his job and that this interest provided Petitioner with a right to receive specific notice from the Respondent about the factors considered to approve the removal.

Last, but not least, and in an abundance of caution, Petitioner will address the Douglas factors. The "Douglas Factors Analysis"[7] does not exempt Respondent from providing the constitutionally

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[7] The "Douglas Factors" are a series of recommended factors, not all inclusive, that an official should consider prior to the imposition of a disciplinary action against a Federal employee.

required "notice" in the Notice of Proposed Removal of each and every factor considered in proposing the removal. In fact, *Douglas v. Veterans Administration Affairs, 5 M.S.P.R. 280 (1981)*, explicitly states : ". . . *aggravating factors on which the Agency intends to rely for imposition of an enhanced penalty. . . should be included in the advance Notice of Charges . . .*" *Id. at 304. (emphasis added) Douglas* then cites *5 C.F.R. § 752. 404 (f)* for the proposition that this section " . . . *forbids the Agency from considering any reason not specified in the advance notice of proposed action. Id. at fn 4. (emphasis added)*. As such, having allegedly considered these allegations as part of the Douglas Factor analysis, did not satisfy the Notice requirement, because, it did not give Petitioner sufficient notice to provide a real opportunity to respond to the allegations.

II. THE ALLEGATIONS WERE EXAGGERATED AND THE EVIDENCE INSUFFICIENT

For a disciplinary action to be sustained , a Respondent must prove: (1) the charged conduct, (2) the nexus[8] between the conduct and the efficiency of the Respondent, and (3) the reasonableness of the penalty. *Pope v. U.S.P.S., 114 F.3d 1144, 1147 (Fed Cir. 1997); Sarratt v. U.S.P.S., 90 M.S.P.R. 405, 406 (2001).* See also, *Williams v. U.S.P.S.,* 5 M.S.P.R. 5, 7 (1981)

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[8]Nexus requires that the discipline promote the efficiency of the service by showing a relationship between the bases of the discipline and the employees ability to perform his duties and/or other legitimate government interest promoting the efficiency of service. *King v. Frazier,77 F.3d 1361, 1363 (Fed Cir. 1995); Doe v. Hampton, 566 F. 2d 265, 272-73 (D.C. Cir. 1977).*

and *Nazelrod v. Dept of Justice*, 54 M.S.P.R. 461, 463-468 (1992). In *Burroughs v. Department of Army, 918 F. 2d 170 (Fed. Cir 1990)*, the Court stated: The Administrative Judge erred in not requiring each of the elements of the . . . charge to be proved. . . *if the Agency fails to prove one of the elements of its charge then the entire charge must fail. Id. at 172. (emphasis added)* In this case the record evidence does not establish either the elements or the charges. The following discussion will show that the allegations were an exaggeration and a subterfuge to get rid of Petitioner.

The Petitioner was charged with "[w]anton disregard of operational directions and failure to follow procedures." (A 41) The charge of wanton disregard of operational direction stem from the alleged violation of the Mutual Aid Agreement (the Agreement)[9] and the Standard Operating Instructions (SOIs)[10] during the responses to the Apartments. In this regard, Respondent alleged: 1) failure to assume command; 2) delay in ordering an investigation at the scene; 3) failure to transfer command properly; 4) failure to properly position a vehicle; 5) failure to use the lights during an incident; and 6) failure to use the 800 MHz radio. (A 41)

This Petition will show how Petitioner's conduct during the responses to the Apartments was proper and how the Mutual Aid Agreement (the Agreement)

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[9] The Mutual Aid Agreement is between the City of Dover (Dover) and the Dover Air Force Base (Dover AFB).

[10] SOIs are the internal regulations of the Agency regulating Fire and Emergency Services at Dover Air Force Base.

and the Standard Operating Instructions (SOIs) also support Petitioner's conduct.

The Apartments Responses

On January 21, 2003, Petitioner was working at Dover AFB as Assistant Fire Chief. During his shift, there were two alarms from the General Greens Apartments in the City of Dover. Dover AFB and the City of Dover had, at this time a Mutual Aid Agreement. The transcript of the response on January 21, 2003 shows that upon arrival at the Apartments, Petitioner directed his crew to go into building and investigate. The transcript reads:

18:48:32	Chief 2	Chief-2copy, fire dispatch Chief-2 on Scene
18:48:41	FACC	Copy that
18:48:49	Chief 2	8 Alpha
18:48:51	Rescue 8	Go ahead
18:48:53	Chief 2	Understand we have no Dover Fire Personnel on Scene
18:48:57	Rescue 8	That's affirmative, as we signed on scene, they were just signing out
18:49:01	Chief 2	Chief 2 copy; go ahead and proceed

Inside.

Twenty nine seconds passed from Petitioner's arrival until he directed the crew to investigate. This was reasonable. Dover was not at the scene, did not evaluate the need for assistance, and did not make the required specific request for equipment and personnel.[11] The only information provided was that "an alarm" was sounding. Under the Agreement, Petitioner was to report to Dover's Commander and provide the assistance he had requested. Further, there was no report, or observation, of fire or smoke. The alarm was actually the result of someone leaving a steak on a broiler without proper ventilation which activated the fire alarm. The transcript reads:

18:53:45	Chief 2	Command by
18:53 8	Bravo	Unattended cooking first floor apartment uh, Dover said the chief has been notified, they have the situation under Control, is returning their Rescue vehicle.
18:54:03	Chief 2	Command copy, are they terminating are we terminating

[11]See discussion below about the Agreement and the SOIs.

18:54:16 8	Alpha	Command Alpha 8
18:54:23 8	Alpha	Command Alpha 8
18:54:24	Chief 2	Command by
18:54:29 8	Alpha	It's uh, unattended *cooking* uh, ventilate the uh *apartment* and the *detectors, going off*, we're going to pull it and reset it, then reset the building.
18:54:36	Chief 2	Command copies, *unattended cooking*, was it *contained* to *the pot* or the pan
18:54:46 8	Alpha	That's *affirmative*, it's *contained to the pan* it *was broiling steak.*

Again, there is no mention of a fire. Further, investigations conducted by two of Respondents Experts did not find a fire. Also, it indicates that Petitioner, while he did not have to, assumed and properly relinquished command. The transcript reads:

18:54:53	Chief 2	Chief-2 copy
18:54:54	8 Alpha	Also briefed Dover and they're going to

		reset the building
18:54:59	Chief 2	Understand the system reset
18:55:08	Chief 2	Command copy, Dover is gonna reset at this time, let me know when they finish.
18:55:30	Alpha 8	Command Alpha 8
18:55:32	Chief 2	Command by
18:55:36	Alpha 8	Dover Assistant Chief released us
18:55:46	Alpha 8	That's affirmative we've been released by Dover Assistant Chief.

During these 29 seconds, Petitioner assessed the status of Dover to whom he was *required* to report and provide the *requested* assistance. Once he determined that Dover was not about to arrive, he directed an investigation. Further, once Petitioner determined Dover was about to arrive, he directed one of his vehicles to relocate from the front of the building so that Dover could take the lead. (A 45) Thus, as to this response , Petitioner assumed and transferred command. If Petitioner had not assumed command why would the Dover Fire Chief have been released Dover AFB?

On January 22, 2003, at 3:11:13 AM, during the same shift, there was a second alarm from the Apartments. This time it specified that it was a fire alarm. Dover, again, did not make the required request for assistance and was not at the scene. At 3:14:46 AM, Petitioner stated he was responding. At 3:18:46 AM, Petitioner arrived at the scene and assumed command. Petitioner, again, is confronted with Dover's absence and no visible signs of fire or smoke. Within 50 seconds, Petitioner determined that Dover was not about to arrive. At 3:19:36 AM, Petitioner begins communications with his crew, assumes command, and directs them to go inside and investigate. As the crew was about to investigate, Petitioner learned that the alarm was the result of vandalism. The transcript reads:

3:18:46	Chief 2	Fire Dispatch Chief 2 on Scene assuming command Capitol Green no fire or smoke showing
3:18:54	FACCCopy	Command
3:19:36	Rescue 8	Go ahead
3:19:39	Chief 2	I guess since nobody is here you can go ahead and make an entry and investigate
3:19:45	Rescue 8	Just uh talked to the manager, he said it [the alarm] was uh vandalism, someone

		pulled the pull station and un took an extinguisher beat on a door police are on the way. Dover Fire is on the way.
3:19:57	Chief 2	Command copy understand the manager informed us it was vandalism someone pulled the sta. . .pulled the station.
3:20:05	Rescue 8	That's affirmative
3:20:11	Chief 2	Command copy, stand by for LE, stand by for law enforcement to get on scene then.

Petitioner reasonably and properly used his discretion[12] and directed his crew to wait for the police to arrive. Petitioner did not leave the scene. He remained in the event that it was determined that he was needed.

The above established that Petitioner did assume command with the first response by his actions and the second by his verbal response. Petitioner, in

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[12]As will be seen below during the discussion of the SOIs Petitioner had ample discretion on how to respond to an alarm, specially one where there was no smoke or fire visible.

terms of the allegations of a delayed response, as the applicable SOIs will establish below, had the discretion to determine how to proceed at the scene when there was no smoke or fire visible (and as admitted by a Respondent witness.) (A 255) This was the case during both alarms. Since he was supposed to report to Dover, per the Agreement, as will be established below, then it was proper for Petitioner to wait a short time for Dover to arrive.

As to the allegations of improperly placing the vehicle, Petitioner only directed the vehicle to move when he determined that Dover was arriving at the scene so that Dover would take the leading role. This was correct because Dover is supposed to be in charge. Petitioner also acted within his discretion according to the SOIs and the Agreement when he directed his crew to wait for his direction before turning on the lights. In addition, there was no evidence introduced that the scene was too dark and that the lights were needed to evaluate the scene. Petitioner had the right to make that call.

The only allegation which was partially established, relating to Petitioner's handling of the responses to the Apartments, was Petitioner's alleged failure to use the 800 MHz radio. However, a witness for Respondent testified that Petitioner used the 800 MHz radio on at least one of the responses. (A 237, 238, 239) The purpose for the use of 800 MHz radio is so that Dover personnel could hear and communicate with Dover AFB during a mutual aid response. If, and when, both fire units are in an incident fighting a fire, they must be able to hear each other. However, there was no such need on either of these responses, since there

was no fire and Dover arrived late - after both incidents were resolved. As such, any violation had minimal impact. One must then ask: How can a disciplinary action based on multiple factors, where only one is partially established, be sustained?

The Agreement does not call for an Automatic Response[13]

The Respondent claims an automatic response was required. The text of the Agreement says otherwise. The Agreement states that "on request to a representative of the Dover Air Force Base Fire and Emergency Services [Dover AFP] by a representative of the . . . City of Dover [(Dover)] . . . fire fighting equipment and personnel of Dover Air Force Base Fire and Emergency Services will be dispatched." (A. 62) This authorizes the City of Dover (Dover) to request assistance and permits Dover Air Force Base Fire and Emergency Services, (Dover AFB) to provide assistance. Paragraph c provides that dispatch of equipment and personnel pursuant to this agreement ". . . any request shall include a statement of the amount and type of equipment and personnel requested and shall specify the location to which the equipment and personnel are to be dispatched, but the amount and types of equipment and number of personnel to be furnished shall be determined by a Representative of the responding organization." (A. 62) This states that

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[13]Automatic response means that once Dover AFB becomes aware of the alarm, it must respond to the alarm immediately, even if no one has contacted Dover and asked for assistance. This discussion is relevant to the charge that Petitioner did not assume command and delayed the investigation.

Dover AFB *does not* have an obligation to automatically respond. Further,¶ c (2) states "[t]he responding organization *shall report to the officer in charge of the requesting organization* at the location to which the equipment is dispatched *and shall be subject to the orders of that official." (emphasis added)* This states that Dover must be at the scene in order to properly evaluate their needs, to make a request for assistance, and to be in charge of the incident. The Agreement explicitly states that *"only in the event of a crash of an aircraft owned or operated by the United States or a military Aircraft of foreign nation within Dover's Jurisdiction, Dover AFB may assume full command."* (A 62)*(emphasis added)*

The above explains and supports Petitioner's actions when he arrived at the scene and waited a very short time, seconds, for Dover to arrive, before he assumed command and directed his fire fighters to investigate the alarms. It also shows that Petitioner was supposed to report to Dover's officer in charge. Last, it shows there is no automatic response.

Petitioner Did Not Violate the SOIs

SOI for Risk Management, 32-2001-02. (A. 64), ¶ 4, "Risk Management," gives the incident commander (IC) *complete discretion* to insure the safety of his crew, i.e., : ". . . [t]he incident commander[14] must continuously evaluate and adjust the deployment of resources at all incidents. *Taking unnecessary risks*

[14] Petitioner became Incident Commander only due to Dover's absence.

with the lives of fire fighting personnel when there is no appreciable benefit is irresponsible.[15]*"(emphasis added)* ¶ 6 states "[t]his risk management plan is intended as a guide only. Each specific incident that fire fighters respond to requires different tactics and/or strategies. The IC and all fire fighters must *use sound judgment* and continuously evaluate risk during all stages of *each particular response." (emphasis added)* This language gives the IC much discretion and latitude. Mutual Aid is only mentioned as Attachment O. (A 64)

The SOI for Mutual Aid responses, 32-2001-06, ¶ 6.2.14. (A 74)[16]

The SOI for Incident Command, 32-2001-06, 6.1.(A 68), ¶ 1.3, states ". . . [t]he Senior Fire Officer is responsible for establishing Command at all incidents where the fire department has management responsibility, including exercises and mutual aid responses." Again, ¶ c (4) of the Agreement outlines when Dover AFB must assume command and in this situation, Petitioner only became the IC due to Dover's absence. This notwithstanding, this SOI provides much discretion to the person in command. It states: ". . . It is

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[15]Petitioner acted properly when during the second response he waited for the police to investigate the alarm that was activated by vandalism.

[16]Provides guidance in the operation of vehicles. Paragraph 1, "Purpose," states, "[t]his . . . SOI establishes guidelines and assignments for the safe operation of fire protection vehicles whether the vehicle is parked or in motion during off base response. . ." This SOI is not relevant to the facts and issues in this case.

anticipated that not all areas of a SOP will cover every possible situation. Common sense should be used in determining what actions to take in the absence or lack of detail. *Id.* In addition, ¶¶ 4.3.1 to 4.3.5, give the IC authority and discretion to determine the best response. Paragraph 4.3.2 requires the person in command to evaluate the situation, and ¶ 4.3.4 requires the person in command to identify the overall strategy, develop an attack plan, and assign units.

Paragraph 4.9.1.1, "Nothing Showing/Investigative Mode," is exactly the situation confronted by Petitioner; i.e., there is was no smoke or fire visible at the Apartments. This section starts with the phrase ". . .[g]enerally requires. . ." This language again provides guidance and not a mandatory requirement, and, as such, the section gives the IC the discretion to determine what approach to take.

The SOI for Structure Fires, 32-2001-06 6.2.2, (A 76) establishes guidelines for "structural fire fighting." Paragraphs 2.1, 2.2, & 2.3 give the IC the discretion to determine what approach to take and states: "*Generally* requires Investigation by the first arriving engine or rescue unit . . ." *Id.* Paragraph 2.1 states that ". . . [t]he nature of the emergency may dictate modifications." Paragraph 2.2 states that ". . .the . . . commander will determine the type of operation fire fighters will perform . . ." And, ¶ 2.3 states that ". . .the [incident commander] . . . should continually assess risk based on the principles of risk management."

The SOI Fire Protection and Operation and Fire Prevention Program, 32-2001, (A 79), ¶ 3.1.7 titled "Mutual Aid Agreements" states: The fire chief

manages Mutual Aid Agreements in accordance with Attachments 4 (US) and 5 (Foreign) of this AFI. If the Air Force provides fire fighting services at joint use civilian airports, include a release and indemnification clause in accordance with Attachment 6 of the AFI. Mutual Aid Agreements, and emergency responses to local communities *not covered by mutual agreements, must be approved by the installation commander.* The above refers to Attachment 4 because it involves a Mutual Aid Agreement within the United States. Attachment 4 is *identical* to the Agreement in question in this case. More important, ¶ 3.1.7 states that responses *not covered by the agreement* must be approved by the installation commander of Dover AFB. The Agreement, only permits responses upon requests for assistance that specifies the amount and type of equipment and personnel needed. Also, ¶ 3.1.7 of this SOI, and ¶ (c) (1)] of the Agreement explicitly give the responding officer discretion on to how to respond. (A 41)

In addition, the following excerpt from the Fire Protection Handbook supports Petitioner's position: "Mutual-aid plans establish procedures for requesting and dispatching help between fire departments so that each party will know what is expected. Mutual-aid plans *may* include immediate joint response of several fire departments to high risk properties; joint response to alarms adjacent to the boundaries between fire department areas (automatic aid); coverage vacant territories by outside departments when resources of local department are engaged; provision of specialized types of firefighting equipment not available locally in adequate quantity for the particular incident. Mutual-aid plans should include provisions for incident

management, standard operating procedures, interdepartmental communications, common terminology, maps, adaptors, and other consideration that directly affect the ability to departments to operate effectively together." (A 80) This language describes many of the matters that may be included in a Mutual Aid Agreement. It does not state that all Mutual Aid Agreements cover or automatically include these matters. It states that for it to be part of the Mutual Aid Agreement, the provision must be included in the Mutual Aid Agreement.

The allegations against Petitioner were exaggerated. The evidence of record as a whole, not just the transcripts of the hearing, show that the charge of "wanton disregard" was not established by a preponderance of the evidence. The evidence also has not established a nexus as to how Petitioner's conduct, despite the allegations, negatively affected the efficiency of the service. Therefore, it is clear that the Removal was not resonable.

CONCLUSION

Petitioner's interpretation of the Agreement and applicable SOIs was and is correct. Petitioner's extensive experience combined by the discretion provided by the SOIs and the fact that there was no visible smoke or fire, gave Petitioner discretion on how to respond. He was to be guided by his experience, common sense, and the safety of his crew. The disciplinary action was an exaggeration of the events, if not, why would Petitioner be permitted to continue work and respond to alarms after the night of January 21, 2003. If his conduct was so egregious, he should had

been placed off duty immediately after the first response to the Apartments. Last, but not least, not only were the events exaggerated but in their determination to get rid of Petitioner, Respondent did not provide Petitioner with the required detailed notice of all factors that were the bases of the Removal. Trial by ambush under any circumstance is unfair, here it is unconscionable. For the foregoing reasons, Petitioner prays that a writ of certiorari be granted and the United States Supreme Court review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully,

JOSÉ LUIS ONGAY, ESQUIRE
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PHILADELPHIA, PA 19147
(215) 928-0859

05-3263

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HENRY C. HIGGINS,
Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,
Respondent.

June 14, 2006, Decided

June 14, 2006, Filed

NOTICE: RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: NEWMAN, SCHALL, and DYK, Circuit Judges.

OPINION: JUDGMENT

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36

Per Curiam

DOCKET NUMBER PH-0752-03-0305-I-1

MERIT SYSTEMS PROTECTION BOARD

HENRY C. HIGGINS,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE, Agency.

May 13, 2005

Jose L. Ongay, Esquire, Philadelphia, Pennsylvania, for the appellant.

Major John B. Flood, Arlington, Virginia, for the agency.

OPINION BY: ROBERTS, JR.

OPINION:

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to

us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision

without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

05-3263

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HENRY C. HIGGINS,
Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,
Respondent.

August 31, 2006, Decided

August 31, 2006, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

PRIOR HISTORY: Higgins v. Dep't of the Air Force, 2006 U.S. App. LEXIS 15031 (Fed. Cir., June 14, 2006)

JUDGES: Before Newman, Circuit Judge, Schall, Circuit Judge, and Dyk, Circuit Judge.

OPINION: ORDER

A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 7, 2006.